Tentative Rulings for September 23, 2003
Departments 22, 70, 72, 73

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, Rule 321(c).)

03CECG01664	**McKee v. Alvarado (Dept. 73)**
412250	**Cumbry v. Fresno Community Hospital (Dept. 72)**
03CECG03223	**Ching v. Kaiser Permanente (Dept. 73)**
01CECG02190	**City of Mendota v. Moreno (Dept. 72)**
02CECG01203	**River Park Properties v. Maudin-Dorfmeier (Dept. 73)**
02CECG01783	**Grant v. Kaiser Permanente (Dept. 73)**

(Tentative Rulings begin at next page)

Tentative Ruling

Re:	**Marmolejo v. University Medical Center, et al.** Superior Court Case No. 03CECG01883
Hearing Date:	Sept. 23, 2003 **(Dept. 73)**
Motions:	(1) Motion to Strike prayer for punitive damages from Original Complaint (2) Demurrer to Original Complaint brought by Defendant Fresno Community Hospital and Medical Center, operator of University Medical Center ("UMC")

Tentative Ruling:

(1) To GRANT the Motion to Strike, WITHOUT LEAVE TO AMEND, except as provided in CCP 425.13. (2) To SUSTAIN the Demurrer, in part, WITH LEAVE TO AMEND. Plaintiff shall have 10 calendar days' leave, within which to file a First Amended Complaint. All new allegations therein shall appear in **boldface** type. Time shall run from the clerk's service of the minute order.

Explanation:

Motion to Strike. Defendant UMC notes correctly that Plaintiff has failed to comply with CCP 425.13 (a) and that Plaintiff's allegations fail to meet the pleading requirements of Civil Code 3294 (a) and (b). Plaintiff has failed to allege facts showing malice, fraud, or oppression, has failed to allege misconduct by a UMC employee, and has failed to allege facts showing that an officer, director, or managing agent of UMC acted with conscious disregard for her safety.

Demurrer. UMC argues the complaint is uncertain because (1) it fails to allege any misconduct by a UMC employee and (2) it fails to allege the nature of Plaintiff's medical condition. The second argument fails. The cases cited by UMC do not hold that Plaintiff in a medical malpractice action must detail her medical condition. (*Greninger v. Fischer* (1947) 81 Cal.App.2d 549, 552; *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) This court must accept the allegations of the complaint as true. Although the complaint alleges that UMC negligently diagnosed and treated plaintiff, it does not allege through whom UMC acted. The Complaint does not allege that Dr. Paul Madsen and Dr. Jeff Thomas are UMC employees. Nor does the Complaint otherwise specify their legal relationship to UMC.

Pursuant to CRC rule 391 (a) and CCP 1019.5 (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling MWS 9/19/03
Issued By: _____ on _____.
(Judge's initials) (Date)

Tentative Ruling

Re: **Fridley v. City of Fresno**, **et al.**
Superior Court Case No: 652995-2

Hearing date: September 23, 2003 **(Dept. 70)**

Motion: City's motion for summary judgment; City's motion to dismiss for delay in prosecution

Tentative Ruling:

To grant the motion for summary judgment. To deny the motion to dismiss on the ground it is moot. Defendant City is directed to submit to this court, within 5 days of service of the minute order by the clerk, a proposed judgment consistent with the court's summary judgment order.

Explanation:

The third amended complaint alleges intentional infliction of emotional distress. It alleges defendant Browning made lewd, sexually suggestive comments to plaintiff on May 3 and 4, 1999. The undisputed facts and supporting evidence submitted by defendant demonstrate that the conduct of Browning on those dates was not outrageous as a matter of law. (*See, Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 494-499; defendant's Undisputed Material Facts, 1-28.) Plaintiff has filed no opposition and has raised no triable issue of material fact.

Pursuant to California Rules of Court, rule 391, subdivision (a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: **hac** (Judge's initials) **on** **9/22/03** (Date).

Tentative Ruling

Re: **Gallardo v. Hall**
Superior Court Case No. 651576-1

Hearing Date: September 23, 2003 **(Dept. 70)**

Motion: Petition to compromise minor's claim

Tentative Ruling:

To grant. Order to be submitted for signature. Hearing off calendar.

Pursuant to California Rules of Court, rule 391, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: **hac** (Judge's initials) **on** **9/22/03** (Date).

Tentative Ruling

Re: **Faridi v. Moore**
Superior Court Case No. 03CECG00676

Hearing Date: September 23rd, 2003 **(Dept. 70)**

Motion: Defendant Sharron's Motion to Vacate Default Judgment

Tentative Ruling:

To deny the motion to vacate the entry of default against defendant Sharron. (CCP § 473(b).)

Explanation:

Under CCP § 473(b), the party seeking discretionary relief must file his or her application "within a reasonable time" and no later than six months after entry of the default. (CCP § 473(b).) Here, defendant filed his motion within six months of entry of the default, but it is less clear whether defendant filed the motion within a reasonable time. Plaintiff took defendant's default in April of 2003, and defendant apparently learned of the default sometime that same month. (Sharron decl., ¶ 4.) In late April or early May, defendant contacted an attorney who sent a letter to plaintiff's counsel asking for a stipulation to set aside the default. (*Ibid*, see also Exhibit A to Sharron decl.) Plaintiff's counsel did not respond to the letter. Defendant then allowed another three months to pass before filing his motion to vacate the default on August 25th.

Where there is any substantial delay between discovery of the default and defendant's filing of the motion for relief, the defendant must offer a reasonable excuse for the delay. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2002) ¶ 5:376, p. 5-89.) Here, defendant does not offer any explanation for his delay in filing the motion, other than a vague statement that he was "unable to hire any attorney until recently for financial reasons…" (Sharron decl., ¶ 6.) Defendant's explanation lacks credibility, since the letter, dated May 15th, was from Cheryl Browns, the same attorney who drafted the present motion. The letter states that "Mr. Sharron has retained me to represent him in the above-entitled matter." (Exhibit A to Sharron decl.) Therefore, it appears that defendant had already hired an attorney as early as May, and thus there was no excuse for his failure to file his motion sooner.

Even if defendant had not actually hired an attorney in May, lack of funds is not a reasonable excuse for failure to file an answer, because the defendant could have sought help from legal aid or appeared *in pro per*. (Weil & Brown, at ¶ 5:334, p. 5-79.) Using the same reasoning, indigence is not an excuse for failure to file a motion to vacate within a reasonable time. In any event, defendant does not state that he was indigent, but rather that he had "financial reasons" for not retaining a lawyer earlier. It is unclear what his financial reasons were, so the court cannot conclude that defendant was indigent.

Furthermore, defendant does not even mention whether he received a copy of the request to enter default in the mail. The request to enter default form contains a signed declaration from plaintiff's counsel stating that counsel mailed the declaration to defendant on April 17th, yet defendant does not state whether he received the default form. If he did, it should have put him on notice in mid-April that he was being sued and that his default was about to be taken. Assuming that defendant did receive the request to enter default form in mid-April, it was unreasonable of him not to immediately seek legal advice or take some steps to set aside the default. In addition, defendant has not explained why, when plaintiff's counsel failed to respond to defense counsel's letter, defendant did not immediately file his motion to vacate. Since defendant has offered no explanation for his delay, it appears that the delay was unreasonable.

In addition, defendant has offered no evidence that the default was the result of excusable neglect, mistake, or any other of the statutory grounds. (CCP § 473(b).) Defendant claims that the entry of the default was a mistake, because he mistakenly believed that the summons and complaint were meant for plaintiff, who frequently received mail at defendant's address. Apparently, then, defendant contends that the default was the result of a mistake of fact, rather than a mistake of law. However, even if defendant made a mistake, the mistake was not reasonable because the summons and complaint were clearly labeled with his name. In addition, the process server handed the summons and complaint to defendant, not to plaintiff, so defendant should have known the documents were intended for him. Under the circumstances, it was not reasonable for defendant to fail to read the summons and complaint, nor was it reasonable for him to assume that the documents were meant for plaintiff.

For the same reasons, the defendant has failed to show that the entry of default was the result of excusable neglect. A party moving to set aside a default based on excusable neglect must show some reasonable excuse for the default. (Weil & Brown, at ¶ 5:329, p. 5-78.) In other words, the moving party must show that the default could not

have been avoided through the exercise of ordinary care. (*Ibid.*) As discussed above, defendant did not act reasonably when he assumed that the summons and complaint were intended for plaintiff rather than for him. Defendant admits that he did not read the documents closely, despite the fact that the process server handed them directly to him. (Sharron decl., ¶ 3.) However, defendant did glance at the documents long enough to see that plaintiff's name was on them, so he should have noticed that his own name was on the documents as well. Defendant has not stated that he was seriously ill, or too feeble to respond to the complaint before the entry of default. Nor has defendant claimed that he cannot read English. (See Weil & Brown, at ¶ 5:330, pp. 5-78 to 5-79.) Defendant does claim that he is inexperienced in legal matters, but ignorance of the law is no excuse. (Weil & Brown, at ¶ 5:313, p. 5-76.) Therefore, defendant has offered no valid excuse for his failure to respond to the complaint in a timely manner, and the court's tentative ruling is to deny his motion to vacate the default.

Pursuant to CRC 391(a) and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: **hac** (Judge's Initials) **on** **9/22/03** (Date).

Tentative Ruling

Re: **Lopez v. Whittle**
Superior Court Case No. 03CECG00675

Hearing Date: September 23rd, 2003 **(Dept. 70)**

Motion: Defendant Whittle's Demurrer to First Amended Complaint

Tentative Ruling:

To sustain the demurrer, with leave to amend. (CCP § 430.10(e).) Plaintiff is ordered to show cause why she should not be sanctioned for filing and serving her opposition late. (CRC 317.) Plaintiff shall file and serve her second amended complaint within 10 days of the date of the court's order. All new allegations shall be in **boldface**.

Explanation:

Defendant argues that the allegations of the FAC are insufficient because plaintiff has not alleged that Harold Lopez died intestate. However, plaintiff alleges in paragraph 2 of the FAC that she is Harold's widow and one of his "heirs at law." Black's Law Dictionary defines an "heir at law" as: "At common law, he who, after his ancestor ***dies intestate***, has a right to all lands, tenements, and hereditaments which belonged to him or of which he was seised." (Black's Law Dictionary, 6th ed. (1990), p. 723, emphasis added.) Therefore, the legal definition of an "heir at law" implies that the decedent died intestate. Since the court must indulge all legal intendments and implications in favor of plaintiff's complaint on demurrer, the allegations are sufficient to state that decedent died without a valid will. Plaintiff has also alleged that the decedent revoked his living trust and all prior wills before his death. (FAC, ¶ 12.) Consequently, since there was no trust and no other will in effect at the time of decedent's death, plaintiff has adequately alleged that she is a successor in interest to decedent's estate under Probate Code § 6401, and CCP §§ 377.10 and 377.11.

On the other hand, plaintiff has not alleged in the FAC that she has filed a declaration pursuant to CCP § 377.32, stating that she is decedent's successor in interest and therefore has standing to pursue a claim on behalf of decedent's estate. However, plaintiff has now filed a declaration under CCP § 377.32 with the court. (See Tersie Lopez decl. re death of Harold Lopez.) The declaration meets most of the

requirements of CCP § 377.32, but it does not state that "No other person has a superior right to commence the action or proceeding or to be substituted for the decedent in the pending action or proceeding." The language of CCP § 377.32 is mandatory, and therefore any failure to comply with its terms renders the declaration insufficient. Consequently, the court cannot accept the declaration in its present form, and plaintiff must file a new declaration that complies with the statute. The court's tentative ruling is to sustain the demurrer with leave to amend, to allow plaintiff a chance to allege compliance with CCP § 377.32.

Defendant also contends that plaintiff has not adequately alleged facts to state a claim for fraud. It is true that a plaintiff must normally plead a claim for fraud with specificity. (5 Witkin, Cal. Procedure (4th ed. 1997) at § 669, pp. 125-127.) However, less specificity is required when it appears from the nature of the allegations that the defendant must necessarily possess full information on the facts. (*Id.* at § 672, p. 130, citing Committee on *Children's Television v. General Foods Corp* (1983) 35 Cal.3d 197, 217.) Here, plaintiff would have a very difficult time pleading specific facts to support her fraud claim because she was not present at the time of the deed's execution, Harold is deceased, and the only other living witness is defendant. Therefore, defendant must necessarily possess full information on the facts regarding the execution of the deed, and it would be unreasonable to force plaintiff to state more specific facts regarding the alleged fraud. The allegations of the complaint are therefore sufficient under the circumstances.

Defendant seems to argue that plaintiff has already conceded that decedent did not need to have the deed interpreted for him, because plaintiff has admitted that decedent was not incompetent or under the real or apparent authority of defendant at the time he executed the deed. (See RFJN, responses to RFA's 4, 7, and 8.) Consequently, defendant claims that Harold could not have reasonably relied on defendant's representations in signing the deed. However, it appears that defendant wishes to contradict the allegations of the complaint and try the merits of the case at the demurrer stage. Obviously, a general demurrer assumes that all properly pleaded allegations of the complaint are true, and only attacks defects in the face of the pleading. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2002) ¶ 7:5, p. 7-5.) It is not the function of a demurrer to challenge the truthfulness of the complaint. (*Ibid.*) Still, the court may consider matters judicially noticeable in ruling on a demurrer, including responses to discovery requests. (*Del E. Webb Corporation v. Structural Materials Co.* (1981) 123 Cal.App.3d 593.) Even if the court were to consider the responses to the RFA's here, however, the most that the responses demonstrate is that decedent was competent at the time he executed the deed, and that defendant did not have real or apparent authority over decedent. (RFJN,

exhibit B.) However, such admissions do not conclusively establish that defendant did not conceal or suppress material facts about the deed from decedent, nor do they show that decedent did not justifiably rely on defendant's representations. Therefore, the court declines to sustain the demurrer to the fraud cause of action based on plaintiff's responses to the requests for admissions.

Pursuant to CRC 391(a) and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling hac 9/22/03
Issued By: _____ on _____.
(Judge's Initials) (Date)

Tentative Ruling

Re: ***In re Tara Caldwell aka Tara Palms***
Superior Court Case No. 03CECG02910

Hearing Date: September 23, 2003 (**Dept. 72**)

Motion: Petition to approve transfer of structured settlement payment rights

Tentative Ruling:

To deny.

Explanation:

It appears there is an anti-assignment clause in the underlying settlement agreement which prohibits sale, mortgage, encumberance, or anticipation of the periodic payments by the payee, Tara Caldwell aka Tara Palms. (*Johnson v. First Colony Life Insurance Co.* (C.D. Cal. 1998) 26 F.Supp.2d 1227, 1229.

Further, it has not been established that the transfer is in the best interest of the payee, taking into account the welfare and support of the payee's dependents. (Ins. Code § 10139.5, subd. (b).)

Pursuant to California Rules of Court, rule 391, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: **S J KANE** (Judge's initials) **on** **9/22/03** (Date).